United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

76-7166
~~75-7619~~

In The

United States Court of Appeals

For The Second Circuit

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK and TRUST COMPANY, FRANKLIN NATIONAL BANK and BANKERS TRUST COMPANY,

Appellees.

B

P/S

On Appeal from the United States District Court for the Southern District of New York.

SUPPLEMENTAL APPENDIX

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AFFIRMATION OF JACK H. WEINER IN OPPOSITION TO MOTION
(Pp. SA1-SA9)

1. Note of issue has been filed;
2. The case is pending in I.C. Part 4;
3. This action was commenced before September 1, 1974.

Calendar No. 94735

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SAMUEL MALLIS,

Plaintiff,

-against-

JEROME B. KATES, JUDITH KATES, JACK J. ARNOLD and JOHN B. FOWLER,

Defendants.

INDEX NO. 25831/72

JACK J. ARNOLD,

Third-Party Plaintiff,

-against-

JEROME B. KATES, BANKERS TRUST COMPANY and WILLIAM LONDON,

Third-Party Defendants.

AFFIRMATION IN OPPOSITION TO MOTION TO AMEND THE THIRD-PARTY COMPLAINT

JACK H. WEINER, an attorney-at-law, admitted to practice in the State of New York, does hereby affirm under penalty of perjury:

I am associated with CHARLES LEEDS, ESQ., attorney for Bankers Trust Company (hereinafter "Bankers") the third-party defendant in the above-captioned case.

I submit this affirmation in opposition to the motion of the third-party plaintiff for leave to amend his third-party complaint against defendant

Bankers on the ground that to permit the third-party plaintiff to change its cause of action on the eve of trial when this case is scheduled to be tried on September 29, 1975 before a jury, would be an abuse of discretion in accordance with the principles set forth by the Appellate Division, First Department in Osbourne v. Miller, 38 A.D.2d 298, 328 N.Y.S.2d 769 (App. Div., 1st Dept. 1972). In the alternative, I urge that the court vacate the note of issue and grant leave to third-party defendant to make the necessary preparations for its defense on the Amended Third-Party Complaint.

For this court to understand this action, it is necessary that we refer to the history of this litigation and the concomittant lawsuits in Federal Court.

A. The Instant Lawsuit.

The instant action was originally commenced by Samuel Mallis, plaintiff against various parties including his attorney, Jack J. Arnold (hereinafter "Arnold"), and Bankers by the issuance of a Summons and Complaint on or about December 6, 1972. The complaint alleges in its second and third causes of action that Arnold breached a contract with plaintiff wherein and whereby he, together with another defendant, John B. Fowler agreed to pay to the plaintiff Samuel Mallis, the sum of $156,728, together with a profit of $50,000 within thirty days of the agreement, i.e., March 3, 1972. The third cause of action alleges:

> "That the defendant Arnold was guilty of negligence and malpractice in that he failed to secure on behalf of the plaintiff unrestricted and unlimited stock; in that he failed to take the usual normal reasonable precautions to secure on behalf of the plaintiff, a valid title to unrestricted and unlimited stock having a value reasonably related to the sums of

money it was intended to secure, but on the contrary accepted documents representations and papers from the defendant "Kates" wholly inadequate for such purpose; in that he failed to exercise reasonable skill in the practice of his profession or to take such precautions as would normally be taken by a practicing attorney in the City and State of New York to secure unrestricted and unlimited stock as collateral; that he recklessly and carelessly failed to heed the plain endorsement of the legend on the stock certificates which indicated that said stock was restricted and limited as to negotiability and transfer; that contrary to the canons of ethics promulgated and/or adopted by the Association of the Bar of the State of New York, the said defendant while purporting to represent and act on behalf of the plaintiff, acted in his own and conflicting interest; and in that the said defendant was otherwise, careless, reckless and negligent in the premises, all to the damage of theplaintiff in the sum of $156,728."

The sixth cause of action of the complaint alleges:

"That the defendant 'Bankers,' anxious to receive from defendants 'Kates' the repayment of its loan foisted off upon the plaintiff the worthless 40,384 shares of restricted 'National' stock, which it had held as collateral from 'Kates' to secure said loan, and wrongfully and fraudulently concealed from plaintiff and 'Arnold' that the collateral was restricted and limited as to its negotiability, assignability and transfer, and was substantially worthless."

The complaint further alleges that Bankers "... made no effort to inform the defendant 'Arnold' of the falsity of said statement of the defendants Kates but on the contrary aided, abetted him and consented to such deception by remaining silent, despite its prior knowledge and notice that the aforesaid representations of 'Kates' were false and fraudulent and that the monies of the plaintiff were to be paid over in reliance thereon." (Para. 46)

Arnold in his answer issued a general denial. Bankers did not answer but moved to dismiss the complaint and for summary judgment on February 30, 1973.

On July 13, 1972, Justice Nadel granted the motion dismissing the complaint with respect to Bankers. A copy of his decision is annexed hereto as Exhibit "A". Justice Nadel stated:

> "Bankers Trust is likewise charged with the same duty to speak for the protection of plaintiff Equity National Industries, Inc., and is charged with both fraud and negligence in permitting "escrowed stock" into the possession of defendant Kates, thereby allegedly aiding and abetting in the swindle.
>
> Plaintiff is proceeding under several fallacies with respect to facts. The Escrow Agreement sets up two classes of shares, conditional shares which were issued to the stockholders of the company being acquired subject to recall if certain profits were not realized, and final shares, which were held by the escrow agent until the number of final shares to be exchanged for conditional shares could be determined. The conditional shares had a restrictive legend placed on both face and back of each certificate. The restriction did not per se make the stock "worthless" as plaintiff contends. Equity National did not allow "escrowed shares" to circulate. These were final shares under the terms of the Escrow Agreement, which plaintiff could have determined from the National Bank of George, the escrow agent, as well as transfer agent, if he had taken the precaution of examining the stock certificates.
>
> The leading case on where there is a duty to speak is Amend v. Hurley, 293 N.Y. 587, which holds that barring a fiduciary or confidential relationship there is no duty to speak. Plaintiff had absolutely no relationship with defendants London, Bankers Trust or Equity National. He was not even a purchaser of the shares, according to his participation in this "investment", the Equity shares are called "collateral" and he is guaranteed repayment out of another stock transaction.
>
> The 'fraudulent concealment' he alleges against these defendants must fall on the basis of plaintiff's own exhibits in opposition to these motions. The legend showing a restriction on the sale or hypothecation of the shares appears on the face and back of both stock certificates. The court is unable to determine when or how plaintiff could or should have been informed by these defendants, who could not and did not know of his existence prior to the closing which he did not attend."

An order of dismissal was entered on August 1, 1973, copy of which is annexed hereto as Exhibit "B." No appeal was taken from this order. On December 13, 1973, Arnold for the first time issued his third-party complaint against defendants, Kates, Bankers and William London asserting that the third-party defendant caused to be prepared an affidavit by Kates knowing that such affidavit was false and making this affidavit for the purpose of having Arnold and his client expect delivery of the stock.

As a remedy he sought judgment over against the third-party defendants if the plaintiff should recover any judgment against Arnold. Issue was joined by Bankers by the service of an Answer on December 26, 1973. The examination before trial of Kates was taken on March 19, 1974. The examination of Arnold began on June 17, 1974 and was concluded on December 17, 1974.

The case was conferenced on or about June 5, 1975. At that time, Arnold had retained a new attorney; his earlier attorney had died.

This motion for leave to amend the complaint was serve upon Bankers on August 1, 1975. By that time, all the discovery had been completed and the case was awaiting jury trial on September 29, 1975. Despite this being the eve of trial, the third-party plaintiff Arnold seeks to amend his complaint to delete from it the provision whereby he admits that he guaranteed to the plaintiff the validity of the transfer and delivery of the share of stocks in controversy and ultimate saleability thereof. (Para. 6) He further alters his complaint by adding a new paragraph eighth which alleges that Kates acknowledged that the representations were false and fraudulent and returned

the sum of $50,000 and $5,000 to Arnold. He also asserts a demand for judgment in the sum of $126,728 against the third-party defendant Bankers in lieu of his earlier request for judgment over should he be found liable for his own alleged malpractice. Thus, on the eve of trial, Arnold has altered his theories and his ad damnum with no opportunity for Bankers to examine the truth or validity of these claims before trial.

B. The Proceeding in Federal Court.

On February 24, 1975, the plaintiff in this case brought still another action in the United States District Court for the Southern District of New York against Bankers, Federal Deposit Insurance Company, European American Bank and Trust Company and Franklin National Bank (S.D.N.Y. 75 Civ. 909 (M.P.)). In that action, the defendants are alleging that that Court has no cause of action under the Securities Exchange Act of 1934. Bankers also alleges that the claim of Samuel Mallis in the Federal Court is barred by collateral estoppel as a result of the decision of Justice Nadel hereinbefore referred to. A copy of the affidavit filed by Nathan Silverman on May 12, 1975 with the United States District Court is annexed hereto as Exhibit C. The matter is still pending before Judge Pollack.

C. The Motion To Amend The Third-Party Complaint Should Be Denied.

As we have shown, the action has been pending in various courts for more than three years. At no time during this period did Arnold or his attorneys attempt to amend the third-party complaint. Although he asserts that the amended third-party complaint presents no new facts, an examination of the two complaints expressly demonstrates that he is varying

the facts. Thus, the original paragraph 6 reads as follows, is no longer in the complaint:

> "Third-Party plaintiff in reliance upon all of the aforesaid warranties and representations made by third-party defendants and the acts engaged in by them, as aforesaid, guaranteed to the plaintiff the validity of the transfer and delivery of the shares of stock hereinabove described, for investment, and the ultimate salability thereof as provided for by the rules of the S.E.C."

Similarly, he asserts a new paragraph eighth in the third-party complaint. This paragraph reads as follows:

> "Third-party defendant Kates acknowledged, to third-party plaintiff, that the representations hereinabove set forth were false and fraudulent (sic) returned to third-party plaintiff the sum of $50,000 and $5,000 to the parties for whom third-party plaintiff acted as attorney in fact, leaving a balance of $126,728 due and owing."

Moreover, he changes his ad damnum from recovery over to a claim (new paragraph ninth) "That as a result of fraud and fradulent representations, of the third-parties, as aforesaid third-party plaintiff was damaged in the sum of $126,728."

In these circumstances the Court under Rule 3025(b) must deny the application for permission to amend the complaint. As was stated in DeFabio v. Nadler Rental Service, Inc., 27 A.D.2d 931, 278 N.Y.S.2d 723 (2d Dept. 1967) where the court expressly held that the lengthy delay of the defendant precluded the Court from allowing it to amend the Answer. (At p. 72) The Court stated at 278 N.Y.S.2d at 727:

> "Despite the general rule in favor of free amendment of the pleadings (CPLR 3023, subdivision (b)), where amendment would result in substantial prejudice to one of the parties because of something which has happened in the interim between the original pleading and the application to amend, and such harm could not be cured by the court, it would be an improvident exercise of discretion to allow such amendment (Washington Life Ins. Co. v. Scott, 119 App.Div. 847, 104 N.Y.S. 893

(1st Dept. 1907); Lentini v. St. Vincent's Hospital, 19 A.D.2d 652, 241 N.Y.S.2d 872 (2d Dept. 1963); 3 Weinstein-Korn-Miller, New York Civil Practice, par. 3025.16 (1966)). Where the party who wishes to amend has or should have knowledge of the facts which he wishes to put in his later pleadings, but refrains from moving to amend for an incusably long period of time, his motion will be denied because of gross laches. (Jennings v. Perkins, 277 App.Div. 1143, 101 N.Y.S.2d 303 (2d Dept. 1950); Loureiro v. Long Island R.R. Co., Misc.2d (Sup.Ct. 1964), affd. 22 A.D.2d 763, 253 N.Y.S.2d 249 (2d Dept. 1964))."

Similarly, the First Department reversed the granting of a motion to increase the ad damnum clause in Osbourne v. Miller, 38 A.D.2d 298, 328 N.Y.S.2d 769. The Court said:

"We have heretofore held in order to increase the ad damnum clause, the plaintiff must produce an affidavit showing the reasons for the delay in making the application and the fact the increase is warranted by reason of information which has recently come to the attention of the plaintiff and excusing the failure of negligence necessitating the amendment. Galarza v. Alcoa Steamship Company, 34 A.D.2d 907, 311 N.Y.S.2d 458; Koi v. P.S.& M. Catering Corp., 15 A.D2d 775; 224 N.Y.S.2d 774. We have also previously held that an application of this nature should not be granted where the plaintiff is chargeable with inordinate laches or where the amount would unfairly prejudice the defendant. Galarza and Koi, supra."

Finally in Boehm Development Corp. v. Sales, 42 A.D.2d 1018 348 N.Y.S.2d 251 (3rd Dept. 1973) the Court affirmed the denial of a motion to amend a claim for damages on the ground that the claim must show "sufficient reasons for the delay in making the motion, and that the increase are warranted by reason of information recently coming to the attention of the claimant." 348 N.Y.S.2d at 253. In this case, there has been no showing whatsoever of any reason for the delay in making this motion.

I submit there is no showing that information has recently come to the attention of the claim. As I have previously shown, Arnold has been fully aware of the facts hereinabove. Since March 1972, he has been privy

to various lawsuits involving these parties. Certainly, if he had any reason to change his claim against Bankers, he had more than ample time to do so and should not be permitted to make this change on the eve of trial.

Moreover, if the Court should nonetheless grant the motion to amend, the Court on its discretion should strike from the calendar this action and grant leave to Bankers to redepose Arnold and any other persons such as the Third-Party Defendant Kates referred to in the new paragraph eighth of the Amended Complaint on the basis of the changed facts.

For these reasons, I urge that the Court deny the motion to amend the complaint and in the alternative, I urge that the case be stricken from the calendar and leave be granted to Bankers to redepose Arnold and anyone else whom it may find necessary to depose.

Dated: New York, New York
August 8, 1975

Jack H. Weiner
JACK H. WEINER

TO: Max Kaplan, Esq.
Attorney for Third-Party
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& Weyher
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Attorneys for Defendant Kates
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New York, New York 10017

SA10

ORDER DISMISSING CAUSE OF ACTION

At an I.C. Trial Part 3 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse located at 60 Centre Street, in the Borough of Manhattan, City of New York, on the 1st day of ~~July~~ August, 1973.

P R E S E N T:

HON: BERNARD NADEL
Justice

----------X

SAMUEL MILLS,

Plaintiff

- against -

JEROME B. KATES, JUDITH KATES, JACK J. ARNOLD, JOHN B. FULLER, JR., EQUITY NATIONAL INDUSTRIES, INC., EQUITY-TAKE TWO, INC., THE NATIONAL BANK OF GEORGIA, BANKERS TRUST COMPANY and WILLIAM LONDON,

Defendants

INDEX NO. 8503[illegible]/72

ORDER DISMISSING CAUSE OF ACTION

----------X

The defendant, BANKERS TRUST COMPANY, by its attorney, CHARLES MEEKS, having duly moved for a Judgment pursuant to CPLR 3211(a) (7) dismissing the Complaint in the above entitled action, upon the ground that the Complaint fails to state a cause of action, and said motion having regularly come on to be heard,

NOW, upon reading and filing the notice of motion dated February 20, 1973, the affidavit of NATHAN SILVERMAN sworn to January 12, 1973, the affidavit of JACK JASPER sworn to January 12, 1973 with the exhibits attached thereto, the reply affidavit of NATHAN SILVERMAN sworn to May 10,

Order Dismissing Cause of Action

1973, in support of the motion, the Summons and Complaint heretofore served herein, and upon the affidavit of ABRAHAM EPSTEIN sworn to April 27, 1973, in opposition thereto, and after hearing NATHAN SILVERMAN, ESQ., of counsel for the defendant, BANKERS TRUST COMPANY in support of said motion, and ABRAHAM EPSTEIN, ESQ., of counsel for the plaintiff, in opposition thereto, and after due deliberation having been held thereon, and upon filing the opinion of the Court,

NOW, upon motion of CHARLES LEEDS, ESQ., attorney for the defendant, BANKERS TRUST COMPANY, it is

ORDERED, that the motion be and the same is hereby in all respects granted, and that Judgment be entered herein dismissing the Complaint in the above entitled action, as against the defendant, BANKERS TRUST COMPANY, with costs as taxed by the Clerk of this Court. and that the action against Bankers Trust Company be severed.

ENTER,

s/ BN

J.S.C.

FILED
August 1, 1973
NEW YORK
COUNTY CLERKS OFFICE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

Index No.

SAMUEL MALLIS AND FRANKLIN KUPFERMAN,

Appellants

- against -

FEDERAL DEPOSIT INSURANCE CORP. etal.,
Appellees,

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 23 *day of* June *19*76 *at*
1) One Wall Street, New York, New York
2) 48 Wall Street, New York, New York
3) 1775 Broadway, New York, New York

deponent served the annexed Supplemental Appendix *upon*
1) Hughes Hubbard
2) Sullivan & Cromwell
3) Charles Leeds

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 23
day of June *19* 76

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977